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No. 785

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, *Petitioner*

v.

TWIN CITY POWER COMPANY and WILLIAM P. DAUCHY, Its Mortgagee

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion-order of the District Court is not reported. It is printed in the Appendix, *infra*, pp. 1a-9a.* The opinion of the Court of Appeals and its

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* References to the Appendix to this brief are shown as "(App., p. ....)." References to the Appendix to the petition are shown as "(Pet. App., p. ....)." "R." references are to the Appendix for the United States filed in the court below.

further order denying rehearing (Pet., App. pp. 20-33), are reported at 248 F. 2d 108.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1957 (Pet., App. pp. 33-34). A petition for rehearing was denied on September 18, 1957. By order of the Chief Justice, dated December 12, 1957, the time for filing a petition for writ of certiorari was extended to and including February 15, 1958. The petition for a writ of certiorari was filed February 14, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether this Court should review findings of fact made by commissioners pursuant to Rule 71A(h) of the Federal Rules of Civil Procedure that have already been rejected as "clearly erroneous."

2. Whether the decision below is in conflict with decisions of other courts of appeals.

3. Whether the decision below, though not final as to the question of the value to be accorded flowage easements, laid down the correct principles of valuation to guide the district court on remand.

FEDERAL RULES INVOLVED

Rule 71A(h), Federal Rules of Civil Procedure, provides as follows:

> Trial.—If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation

shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

Rule 53(e)(2), Federal Rules of Civil Procedure, provides as follows:

In Non-Jury Actions.—In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

STATEMENT

The petition is a continuation of the litigation resulting from the opinion and remand by this Court in *U. S.* v. *Twin City Power Company,* 350 U.S. 222, *rehearing denied,* 350 U.S. 1009.

The case involves compensation for the taking by Petitioner of property owned by Respondent in South Carolina, and by its wholly owned subsidiary in Georgia, for the construction of the Clark Hill Reservoir on the Savannah River. As a result of the filing of declarations of taking by Petitioner, commissioners were appointed by the district court to value the taken property. The commissioners concluded that Respondent's lands in South Carolina had a value of $267.02 per acre if the availability of such lands for hydroelectric power purposes was taken into account; but, that such property had a value of approximately $37 per acre as agriculture or wild forest lands.

The district court, without considering or approving the value for agriculture and forest purposes, approved the commissioners' valuation of the lands for water power purposes. The court of appeals affirmed. This Court granted certiorari and reversed on the ground that "the value of the land as a site for hydroelectric power operations" could not be an element of just compensation.

On remand, the district judge, sitting with the District Judge for the Southern District of Georgia, who had jurisdiction with respect to the lands on the Georgia side of the river, for the first time considered and reviewed the evidence and findings of the commissioners as to the value of Respondent's lands for agriculture and forestry purposes. After a most careful

and detailed review the district court in its order-opinion dated November 1, 1956 (App., pp. 1a-9a) held that the findings of the commissioners as to the agriculture and forest value of the lands were "clearly erroneous." The District Court for the Southern District of Georgia reached the identical conclusion. The District Court in South Carolina found the correct agriculture and forest value of the lands, including standing timber but excluding hydroelectric power site value, to be approximately $80.00 per acre. This resulted in an award which was 27% of prior power site value. Petitioner appealed.

In addition, the commissioners had concluded that Respondent's claim for the taking of certain flowage easements should be ~~denied if~~ hydroelectric power site value were not included, since in that event, the "flowage acres [would] have no value whatsoever in the hands of Twin City." (R. 206). The district court on remand agreed with this alternative conclusion of the commissioners and Respondent appealed.

On appeal, the Court of Appeals for the Fourth Circuit affirmed the judgment of the district court insofar as it had awarded agriculture and forest value in compensation for the lands which Respondent had owned in fee simple. The court of appeals reversed the judgment of the district court insofar as it had held that Respondent's flowage easements were worthless and remanded for further proceedings to place a value on these easements.

ARGUMENT

I. THE COMMISSIONERS' FINDINGS OF FACT HAVE BEEN PROPERLY REJECTED AS "CLEARLY ERRONEOUS"

Petitioner's first argument for certiorari is nothing more than the usual attempt by the party who has lost its case on the facts in two lower courts to enlarge its continuing dispute on these facts with those courts into a further review by this Court. In order to clothe the factual nature of its argument in legal dress, Petitioner, naturally, contends that the district court below disregarded the requirement of Rule 53(e)(2) of the Federal Rules of Civil Procedure, which states that "the master's findings of fact [shall be accepted by the court] unless clearly erroneous." The prescription of Rule 53(e)(2), which is made applicable by Rule 71A(h) to the findings of fact of commissioners in condemnation proceedings, is said to have been ignored. This argument is supported by reference to selective excerpts from the testimony of witnesses who appeared before the commissioners. Hence, here, as in the district court and as in the court of appeals, Petitioner seeks a determination that findings of fact are not "clearly erroneous." An attempt to secure such a determination is the sole purpose of the first question presented by the petition.

Here there is no issue regarding the principles of review under Rule 53(e)(2) cited by Petitioner (Petition, p. 11). Respondent does not maintain that the district court below was free to set aside the commissioners' findings, as Petitioner states, "purely on the basis of a differing estimate of the weight to be accorded to the conflicting testimony of the witnesses" (Petition, p. 2). The district court did not act on any such basis. It set aside the commissioner's findings

because, after careful review and detailed discussion, it found them to be "clearly erroneous" within the meaning of Rule 53(e)(2).

Joined in his review of the commissioners' findings by the district judge from Georgia, who made a like decision to reject the findings as they were applicable to Respondent's lands in that state, the district judge below (App., p. 2a) followed the "controlling principle" for reviewing commissioners' findings stated in *United States* v. *Waymire,* 202 F. 2d 550, 553 (1953):

> ". . . Under the plain language of Rule 53, it is the duty of the court to accept the findings of fact made by a master unless they are clearly erroneous. But the findings of a master may be modified in part, or rejected in toto, if they are clearly erroneous. In like manner, under the equally clear language of Rule 71A(h), the findings and awards of a commission shall be accepted unless they are clearly erroneous. But they may be modified in part, or rejected in toto, if they are clearly erroneous. And even though there is evidence to sustain findings of a master or a commission, as the case may be, they are clearly erroneous if the reviewing court on the entire evidence has the definite and firm conviction that a mistake has been committed. . . ."

The court's further citation (App., p. 3a) to *United States* v. *U. S. Gypsum Co.,* 333 U.S. 364, 395, again indicates its complete understanding of the applicable rule of review. In the *Gypsum* case, this Court declared (333 U.S. at 395):

> ". . . A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Nor was the action taken by the district court below unique or extreme. Findings of masters or commissioners have more than once been set aside by district judges, who have been then upheld on appeal. See, *e.g., United States* v. *44 Acres of Land,* 234 F. 2d 410 (2d Cir. 1956), *cert. denied sub nom. Odenbach* v. *United States,* 352 U.S. 917; *Krinsley* v. *United Artists Corp.,* 235 F. 2d 253 (7th Cir. 1956). To deny a district judge this power, as Petitioner seems to do, would remove from him the ultimate responsibility for findings of fact in non-jury cases, which the Federal Rules of Civil Procedure clearly intend that he have. Rules 52(a), 53(e)(2), 71A(h).

Unquestionably, therefore, there is no dispute between Petitioner and Respondent, or Petitioner and the district court, over the principle of law to be applied in reviewing the commissioners' findings. But, Petitioner argues, the district court did not apply this principle. And to support this contention it cites, as it must, evidence from the testimony of witnesses who appeared before the commissioners. As was inevitable, Petitioner's argument leads it to urge this Court also to review the testimony and then to decide for itself whether the district court acted properly. This invitation is extended after two courts have already agreed upon the factual issues Petitioner wishes to have reviewed for a third time.

The extracts from the testimony of witnesses, which the Petitioner cites in support of its view that the district court erred, are the typical selective, one-sided bits of evidence which a party seeking to overturn findings of fact urges upon an appellate court. Conveniently for itself, the Petitioner neglects to note the great body of evidence recounted in the district court's

opinion which left it, to use the words of this Court in the *Gypsum* case, *supra*, "with the definite and firm conviction that a mistake had been committed."

Merely illustrative of the significant evidence upon which the district court relied in holding the commissioners' findings "clearly erroneous" is the following:

(1) Most significantly, the sales of comparable lands in the neighborhood of Respondent's taken lands, on which the Petitioner's chief witness, Cooley, relied for his appraisal, were made several years before the time of the taking in late 1949 and in 1950 (R. 150). The witness admitted that at the time of the taking it would have been necessary to pay a higher price for these comparable lands than the prices paid in the earlier sales he relied upon (R. 150-152).

(2) Cooley listed over 400 land transfers which he chose initially for his "Comparable Sales" method of appraisal, but his *actual* comparison of land values with Respondent's properties were based entirely on seven selected sales whose price the witness admitted to be much lower than the price paid for other comparable lands on his initial list (R. 137-41). Nor was any explanation offered for this failure to include higher priced land sales except that the witness "did not deem it necessary for this purpose to have a longer list than" the sales selected (R. 136). Moreover, of these seven sales actually relied upon, five were made in the area of the reservoir itself after Petitioner announced that the dam project was to be developed. Such sales could not evidence "market value," for no farmer would buy such land knowing that it was to be flooded in a year or two (App., p. 4a; R. 144-46, 181). From the foregoing, the district judge concluded that

Cooley's testimony contained "little of probative value" (App., p. 4a).

(3) Another of Petitioner's witnesses, Cox, a sawmill operator, was able to appraise the land primarily for its timber value and then only in terms of "making a sawmill man's profit on it" (R. 88, 94). He was apparently unable to value the properties as cattle pasture lands although he admitted this to be one of their best uses (R. 89, 97).

(4) The district court also discussed the testimony of Respondent's witnesses, particularly that of the witness Henderson, whose testimony it found to be compelling for its completeness and consistency (App., p. 3a). Henderson, a farmer and cattleman with 18 years of appraisal experience for the Federal Land Bank and the Federal Housing Administration, had appraised over 45,000 acres in the area of the dam project (R. 3, 9). He had studied each tract in detail, spending some seven or eight days in reaching its valuations. He pointed out, in support of his figures, that the taken lands were in an area experiencing rapid growth in cattle raising and that the bottom lands were very valuable for row crops (R. 10). The district court described Henderson's valuations as "the most careful appraisal of the land" (App., p. 8a).

A reading of the district court's opinion discloses numerous other aspects in which the testimony of Petitioner's witnesses was defective and of dubious value as compared with the evidence provided by Respondent's witnesses. Citation of these parts of the testimony would be uselessly repetitious here.[1]

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[1] The district judge noted, in addition, what he termed "a major inconsistency in the Commissioners' report" (App., p. 6a). When

This Court should, moreover, reject Petitioner's persistent attempt to confuse the district judge's careful setting aside of the commissioners' findings as "clearly erroneous" with the problem of determining the credibility of witnesses. An attentive reading of the district judge's opinion discloses that he did not pick and choose among testimony which could possibly be affected by the credibility of the witness giving it. He was, rather, concerned with the *competency* of the various witnesses who testified for Petitioner and Respondent (App., 3a-5a). In addition, as already noted above, he was particularly disturbed by the serious gaps and inconsistencies in the testimony of Petitioner's chief witness, Cooley, whose appraisal of the lands was based largely on selected sales made several years before the taking and who himself admitted that near the time of the taking a much higher purchase price would have been demanded than his appraisals indicated (App., p. 4a). Confronted with this and other evidence highlighting the weakness of Petitioner's witnesses and their testimony, the district judge acted

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the commissioners first valued Respondent's lands on the basis of their use for a power site, they deducted from the market value figure a sum equal to the value of lands which Respondent did not own but on which it had options to flood that had expired at the time of the taking. In valuing these latter "option acres" the commissioners had accepted a figure of $80 per acre as their value for agricultural purposes, and then multiplied this figure by 5.7 to reach the "hold-up" price for the lands which would have been demanded of a power site developer (App., p. 6a; R. 1-3; 214, 245-6). The district judge declared on this point (App., p. 6a): "If the agricultural value is $80.00 per acre when a deduction from power value is under consideration, it is difficult to rationalize a value of $30.00 when agricultural value is the yardstick of just compensation. This inconsistency confirms my view that the Report is clearly erroneous in its determination of land values . . . ."

fully within his power under Rule 53(e)(2) in rejecting the commissioners' findings. That he did not do so arbitrarily is evidenced, in part, by his acceptance of the valuation fixed by Petitioner's witness, Honnold, for the timber on the taken lands. Petitioner's attempt to inject the "credibility of witnesses" issue to support the contention that the court violated its reviewing function should, accordingly, be recognized for what it is: a means to place in a more attractive light for this Court the essentially factual issues sought to be reviewed.

Respondent respectfully submits that, so understood, this portion of the petition for certiorari presents for review by this Court questions controlled purely by the facts involved in the condemnation proceedings which are the subject of this litigation. A grant of certiorari on this point would, as a result, necessarily compel this Court to engage in a restudy of those facts solely for the purpose of deciding whether the district court was correct in holding the commissioners' findings "clearly erroneous." Although this Court has the power to undertake such a study, it would be entirely unwarranted in this case, for the Petitioner has failed to demonstrate that the district court proceeded with even slight disregard for the principle of law controlling its action or without a thorough and searching analysis of the evidence presented to it for review.

The first question presented should, thus, be treated under the long-standing practice of this Court to deny certiorari where the issues presented for review are "findings of fact" made or approved by two lower courts. See *United States* v. *Dickinson*, 331 U.S. 745, 751; *Comstock* v. *Group of Investors*, 335 U.S. 211,

214; *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U.S. 3. The district court made findings of fact after it held those of the commissioners to be "clearly erroneous." The court of appeals affirmed. With the proceedings in this posture, Petitioner's attempt to have this Court engage in a further inquiry into the facts of this case should be summarily rejected.

II. The decision below does not conflict with decisions of other courts of appeals

As the second ground for seeking certiorari, the Petitioner urges upon this Court an interpretation of the opinion of the court below which, Petitioner claims, would bring that court into conflict with decisions of other courts of appeals (Petition, pp. 12-14). Relying entirely upon a single sentence from the opinion of the court below, Petitioner would have this Court believe that the court of appeals reviewed *only* the question of whether the findings of fact made by the district judge were "clearly erroneous," while entirely disregarding the validity of the findings of fact made by the commissioners. Without even seriously investigating in its petition what and whom the court below did in fact review, the Petitioner rushes immediately into a claim that a conflict among the circuits exists.

It is not surprising that no attempt was made by Petitioner to describe explicitly what review of the proceedings was undertaken by the court of appeals and how it was in error. For, as shown below, the court methodically scrutinized first the findings of fact of the commissioners and then the findings of the district court. The court held that the findings of the former were "clearly erroneous" and that those of the latter were not. This, exactly, is what Petitioner

claims should have been done; this, exactly, is what the court of appeals did.

The very first sentence of that portion of the opinion of the court below which deals with the findings of the commissioners makes unmistakably clear that it was subjecting their findings to the review of the "clearly erroneous" test. Thus, the court of appeals stated (Pet. App., p. 22):

> "We think that the District Judge was justified in holding the report of the Commissioners as to the valuation of the land for agriculture and forestry purposes to be clearly erroneous and substituting a valuation at which he had arrived after a careful study of the testimony; and weight is added to his action by reason of the fact that the District Judge from Georgia, sitting with him and reviewing the same record took similar action."

It is nearly impossible to construe this portion of the opinion to mean that the court was limiting its review to a study of the findings made by the district court. This conclusion is borne out by the court's discussion of the commissioners' report and the district court's opinion which follows this introductory sentence (Pet. App., pp. 22-24). It is true that the court of appeals, in holding the findings of the commissioners "clearly erroneous," cited the same findings of fact made by the commissioners that led the district court to reach a like decision. But contrary to Petitioner's suggestion, made with no elaboration or analysis of the court's opinion, that this unanimity of view in the two courts below resulted from an abdication of its responsibility by the court of appeals, it is far more plausible to conclude that the courts below agreed *be-*

cause the commissioners' findings of fact were "clearly erroneous."[2]

Petitioner's sole basis for the claim that the court of appeals erroneously limited its review to the findings of fact made by the district court is contained in a later portion of the court's opinion appearing *after* it had already determined that the commissioners' findings were in error. The court then felt called upon to decide whether the substituted findings made by the district court were themselves "clearly erroneous." In so doing, the court of appeals appeared to be following the procedure employed recently by the Court of Appeals for the Second Circuit in *United States* v. *44 Acres of Land, supra,* another condemnation proceeding. There, the late Judge Frank declared (234 F. 2d at 414):

> "It is obvious to us, and it was to the judge, that, in valuing the property, the Commissioners (despite their statement that they took all pertinent factors into consideration) relied primarily on reproduction-cost-new less depreciation. *The*

[2] The opinion below was signed by Judges Parker, Soper and Haynsworth. An earlier opinion by two of these members of the court below in another condemnation proceeding makes very evident their understanding that the findings of fact of commissioners were to be subjected to review in the court of appeals. In United States v. Wateree Power Co., 220 F.2d 226 (4th Cir. 1955), an appeal in another proceeding involving lands taken for the same dam project as were Respondent's, Judge Soper, writing for Judges Parker and Dobie, upheld an award made by commissioners, and affirmed by the district court, which measured a landowner's compensation for his taken land by its value for industrial site purposes. While the court there decided initially whether, as a matter of law, such a basis for valuation was permissible the major portion of its opinion reviewed the accuracy of the value actually placed upon the lands by various witnesses.

> *judge,* in his excellent opinion, *properly rejected such a valuation. We think his revised valuation is amply supported by the evidence, and that it is not 'clearly erroneous.'*
>
> "We think it immaterial that, in revising the Commissioners' findings as to 'severance' and rental values, the judge did not explicitly state that they were clearly erronous. We think his revised findings are amply supported by the evidence." (Emphasis added.)

Whether such double-review is required by Federal Rules 52(a) and 53(e)(2) is irrelevant in the present action. Certainly, it is not a basis for certiorari. No possible harm could have been suffered by the Petitioner from the action of the court below in reviewing whether the findings of both the district court and the commissioners were "clearly erroneous," and none is claimed. Indeed, in these proceedings it was the Respondent, not the Petitioner, who was exposed to possible reduced recovery by this procedure adopted by the court of appeals.

From all the foregoing, there can be no doubt that Petitioner's claim of a conflict between the court below and other courts of appeals is spurious. The decisions cited by Petitioner and that of the court of appeals below are entirely in accord. As has been indicated above and as a reading of the court's opinion demonstrates, the decision of the court below—like the decisions of the courts on which Petitioner relies for a conflict—does review the findings of the initial trier of fact. Petitioner's claim of conflict is thus reduced to a quibble over whether the court was required to precede its clear action of reviewing the commissioners with the quotations of judicial chapter and

verse in the form of citation to opinions containing the principle of appellate review in fact applied. Respondent submits that a court's decision need not, to be proper, contain at every point a mechanical incantation of legal rubrics, whose absence becomes a cause for the losing side to place unwarranted emphasis on selected excerpts from an entire opinion which distort its intended meaning. The test of the adequacy of appellate review in the circumstances presented here should instead be what the court of appeals below *did*, and not the presumed authorities it may have failed to cite.

That this case presents a most unpromising field in which to find a conflict between courts of appeals, or between any of them and decisions of this Court—or even to find an error of law—is further shown by the decision, as yet unreported, on February 28, 1958, of the Court of Appeals for the Fifth Circuit in the companion case to the present proceeding. It will be remembered that the District Court in Georgia held that the same findings by the same commissioners as are involved here were "clearly erroneous." The Court of Appeals for the Fifth Circuit has now agreed with this conclusion.[3]

Thus in these two proceedings eight federal judges have considered the law and the facts. They are unanimous in declaring the law to be that given by this Court in *Anderson* v. *Mt. Clemens Pottery* 328 U.S. 680, 689. Indeed, the Court of Appeals for the Fifth

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[3] Judges Rives and Brown held that the district judge had properly set aside the commissioners' findings as "clearly erroneous" and that his substituted findings were themselves not "clearly erroneous." Judge Tuttle dissented.

Circuit cited one of its own prior opinions which sets forth the law succinctly and clearly enough:

> ". . . the duty to determine whether the referee's findings 'must be accepted' and whether the district judge has erred in not accepting them is not the district judge's but ours." *Phillips* v. *Baker*, 165 F. 2d 578, 581 (5th Cir. 1948).

With this view of the law taken by all eight judges the parties have now added their agreement. This would seem to indicate unanimity and leave little necessity for review by this Court. But a ground is put forward and is best exemplified by Judge Tuttle's dissent in the Fifth Circuit. Judge Tuttle was worried and his worries led him to dissent, not on the statement of law made by his brethren—for he cites the very words of the very cases which they thought controlling—but upon the way he thought that they applied the law. And why did he disagree with their application of the law? Because he disagreed with them on the facts. He thought that to upset the commissioners was "strongly against the weight of the evidence," and, therefore, quite understandably, found it hard to believe that seven other judges could find the commissioners' conclusions "clearly erroneous."

That Judge Tuttle's real argument, like that of Petitioner here, is upon the facts appears from his psychiatric examination of the opinions of both courts of appeals. Although they said that the real issue was whether the commissioners' findings were clearly erroneous, did they really mean this? Did not other phrases which they used suggest that they really believed the issue to be whether the district judges were "clearly erroneous" in holding that the commissioners'

findings were "clearly erroneous"? This is all very difficult because, as he points out, the opinion of the majority specifically stated (and quite rightly) that one of the questions before the court was whether the district court erred "in rejecting the findings of the commission as clearly erroneous." It would have been hard to quarrel with this, had it not seemed to Judge Tuttle that in some way or other this question had become "merged" with the question "whether the district court applied the proper standard in considering the findings." With the question at issue thus "merged" in his mind with some obscurity, it is understandable that Judge Tuttle had trouble with the court's conclusion. So, while he recognized that "the opinion of the majority does say 'we cannot say that the district court erred in rejecting the commission[ers'] findings as clearly erroneous'," he felt that "the majority was not prepared to say 'we think the commission[ers'] findings were clearly erroneous and we would set them aside.' "

The solution of this complex exercise in semantics will not be found in pursuing it further. The essence of Judge Tuttle's position, as of Petitioner's, is that he sided, as he frankly said, with the commissioners. The other seven judges thought their findings "clearly erroneous." That this is the case is demonstrated not by refining the meaning of words—an exercise known in academic circles as "you hold the sieve while I milk the barren heifer"—but by examining the examination which the court below gave to the commissioners' findings, as we have done on pages 13 through 16, *supra*.

III. The decision below, though not final as to the question of the value to be accorded flowage easements, laid down the correct principles of valuation to guide the district court on remand

The asserted third reason for granting the writ stems from the remand by the court below to the district court for further consideration of the question of whether and to what extent compensation must be paid by the Government for the taking of certain flowage easements.

The number of taken acres covered by Respondent's flowage easements, as well as the proper amount of compensation to be paid for such taking has, as yet, to be determined. Thus, Petitioner's third point, although a question of law and not of fact, is still in a hypothetical posture and not ready for review by this Court. In addition to this lack of finality, the third question presented by Petitioner is by now a rather tired element in the case. It has been much discussed and considered by four different tribunals on six different occasions during the eleven-year course of these proceedings.

However, if the substantive point raised by the Petitioner is to be met, the action of the court below can hardly be termed novel. Since Domesday, flowage easements have been recognized property rights.[4] So, in *Slattery Company* v. *United States,* 231 F. 2d 37, 44 (5th Cir. 1956), the Government paid just compensation for "expropriating a flowage easement in connection with the operation and maintenance of the Wallace Lake Reservoir dam project." Petitioner,

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[4] 3 Kent, Commentaries *439 (13th ed. 1884) and 3 Kent, Commentaries *440 n. x[1] (13th ed. 1884).

nevertheless, asserts the doctrine requiring compensation for the taking of a flowage easement to be a novel one. It was, says Petitioner, first announced by the Fourth Circuit, in *U. S.* v. *2979.72 Acres of Land, Etc.*, 237 F. 2d 165 (4th Cir. 1956). The doctrine is somewhat older.[5]

Respondent, through the purchase of flowage easements, obtained the right to flood for any purpose whatsoever land it did not own. The easements had value since they were the right to destroy the use of the

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[5] The Tennessee Valley Authority followed the policy, under certain circumstances, of taking only easements. Its Assistant General Counsel described the policy in this way:

> "No uniform policy has been followed with reference to the purchase of easements or fees, the decision being made largely on the basis of the type of land affected. In the larger municipalities, such as Knoxville, Chattanooga, and Decatur, where riverfront land has a distinct industrial or commercial value, the general policy of acquiring only easements has been followed. This has also been true where fertile land is affected which will still be valuable for agriculture after the construction of the reservoir, as in large parts of Douglas, Cherokee, Fort Loudoun, and Kentucky Reservoirs. On the other hand, where the land adjoining a reservoir is poor upland, valuable primarily for recreation, the general policy has been to acquire such lands in fee, as, for example, in the Norris and Hiwassee Reservoirs.
>
> "The determination of exactly what land or interest shall be taken cannot, however, be decided simply on the basis of general policies. Where a farm is entirely flooded, it is taken in its entirety; but where the maximum reservoir elevation runs through a piece of land or where roads serving the land are flooded, the decision as to what interest to take is based on a study of the effect of the reservoir on that particular piece of land." Land Acquisition Policies and Proceedings in TVA—A Study of the Role of Land Acquisition in a Regional Agency, by Charles J. McCarthy, Ohio State Law Journal, Vol. X, No. 1, Winter 1949, pp. 46, 50, 51.

land for agricultural and forest purposes. Yet, to Petitioner, the value of the servient agricultural and forest estate is irrelevant in valuing the flowage easement.[6] This is said to be so because the easement "gives no right to grow crops, raise cattle or cultivate trees." Indeed. The easements quite clearly gave the right to prevent such husbandry. No matter how the question is framed, it must be that the following items will enter into the value of these rights to flood: The agricultural and timber value of the land discounted by the probable time lapse prior to flooding and the extent and duration of the flooding.

Talk of the "unit rule" of valuation is as misleading as the use to which Petitioner puts *Boston Chamber of Commerce* v. *Boston,* 217 U.S. 189. There, three parties had an interest in the taken land. The Chamber of Commerce owned the fee and a building thereon; The Central Wharf and Wet Dock Corporation had an easement of way, light and air over the land; and the Boston Five Cents Savings Bank held a mortgage, subject to the easement. Mr. Justice Holmes, writing for the Court, affirmed a judgment based on a showing that the easement was of such great value to the Central Wharf and Wet Dock Corporation that "the market value of the estate of the Chamber of Commerce was little or nothing."

Respondent does not ask that the Court disregard the mode of ownership of the acres over which they

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[6] Petitioner's error results from the failure to distinguish the character of the easements in question from the much more common easements of way. The latter only authorize what may be called a right of crossing. This right is not necessarily related to the value of the use of the servient estate and may, in fact, be far more valuable than the land which bears the way. A flowage easement, on the other hand, is the right to destroy completely the use of the entire servient land.

have flowage easements. As Petitioner correctly states "the question is what the owner has lost, not what the taker has gained." Since the fee owners have lost little or nothing by the taking, their award must be diminished by the fact that the parcels of land are "not held as an unencumbered whole," but are subject to flowage easements. What was taken with respect to the flowage acres belonged not to the fee owners but to Respondents.[7]

Petitioner's last and Parthian arrow is that in any event Respondent's flowage easements are worthless.[8] This is said to follow from the fact that this Court has held that just compensation need not be paid for "the value of the land as a site for hydroelectric power operations." *United States* v. *Twin City Power Company,* 350 U.S. 222, 224. Respondent naturally quarrels with this holding, but in any event all this Court announced in the *Twin City* case was that in taking the property in question, the Government need compensate only for the destruction of the agricultural and forest value of the land. The right to destroy this value, for which the Government must pay, is the thing which Respondent owns.

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[7] As the Petition implies, it may be that the fee owners of the flowage acres have been over-compensated since they have been paid as if the easements in question did not exist. This represents an application of the "unit rule" to which Petitioner asserts that it objects. What Petitioner may have done was to pay the fee owners in question as if they owned "an unencumbered whole." Boston Chamber of Commerce v. Boston, supra. Such an error by Petitioner should not permit the taking for nothing of Respondent's property.

[8] Petitioners cite (Petition, pp. 15, 18) the conclusion of the commissioners that the flowage easements were without value. This legal conclusion is, of course, here at issue.

Petitioner, by stating that all Respondent owns is the right to flood solely for a hydroelectric power site, attempts to force the conclusion that the flowage easement is worthless absent the factor of the hydroelectric power site. However, what Respondent owns is the right to flood and thereby destroy the use of the servient estate for any purpose whatsoever. Petitioner has taken only what Respondent already owns by a prior purchase from the fee owners. Thus, though the exclusion of the power site factor diminishes the compensation that must be paid flowage tenants, it does not extinguish it. If Respondent errs, the Government may take as it pleases without thought of compensation whenever the lands are riparian and the purpose is hydroelectric.

CONCLUSION

For the foregoing reasons, it is submitted that none of the three grounds urged for granting the writ are valid and the petition should be denied. Should the petition nevertheless be granted, it should be limited to the third question presented.

Respectfully submitted,

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March, 1958

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF SOUTH CAROLINA
GREENWOOD DIVISION

C/A No. 786

UNITED STATES OF AMERICA

vs.

3,829.09 ACRES OF LAND, MORE OR LESS, IN McCORMICK COUNTY, SOUTH CAROLINA, ET AL.

C/A No. 1033

UNITED STATES OF AMERICA

vs.

3,906.24 ACRES OF LAND, MORE OR LESS, SITUATE IN McCORMICK COUNTY, SOUTH CAROLINA, ET AL.

C/A No. 1073

UNITED STATES OF AMERICA

vs.

5,231.66 ACRES OF LAND, MORE OR LESS, SITUATED IN McCORMICK COUNTY, SOUTH CAROLINA, AND ANNIE PEARL ROBERTSON, ET AL.

Order

When these condemnation proceedings were before this Court on Objections filed by both parties to the Report of the Commissioners of May 14, 1953, the question of the value of the Twin City property for agricultural purposes was not reached since it was my view that the highest and best use for the properties was in connection with the waters of the Savannah River for hydro electric purposes. This use was so probable at the time of taking that it nec-

essarily affected market value and my award was based on this potential use. *United States* v. *Twin City*, 114 F. Supp. 719. After affirmance by the Court of Appeals (215 F.2d. 592) the United States Supreme Court reversed, holding that the portion of the market value attributable to the proximity of the land to the navigable Savannah was not to be included in the just compensation due the landowner when the United States condemns. *United States* v. *Twin City Power Co.*, 350 U.S. 222.

The companion condemnation proceedings involving the Georgia land followed a similar course. *United States* v. *Twin City Power Company of Georgia*, 221 F. (2d) 299; 350 U.S. 956.

On remand motions to reopen and to receive additional testimony were filed by the two Twin City corporations, respectively, and Judge Scarlett, of the Southern District of Georgia, and I sat together to hear the matter on these motions and on the objections heretofore filed in each Court to the Report. At the hearing Twin City withdrew its motions to re-refer the cause to Commissioners, but pressed its objections to the Report. The United States abandoned its objections to the Report and moved to confirm the findings of agricultural value contained in the Report.

The controlling principle in reviewing Commissioners' findings and recommendations is thus stated in *United States* v. *Waymire* (1953), 202 F.2d. 550, 553:

> Under the plain language of Rule 53, it is the duty of the court to accept the findings of fact made by a master unless they are clearly erroneous. But the findings of a master may be modified in part, or rejected in toto, if they are clearly erroneous. In like manner, under the equally clear language of Rule 71A(h), the findings and awards of a commission shall be accepted unless they are clearly erroneous. But they may be modified in part, or rejected in toto, if they are clearly erroneous. And even though there is evidence to sustain findings of a master or a commission, as the case may be, they are clearly erroneous if the reviewing court on the entire evidence has the definite and firm conviction that a mistake has been committed.

United States v. *U. S. Gypsum Co.*, 333 U.S. 364, 395; *Beckley* v. *Boone* (4 Cir.), 115 F.2d. 513, 515-516.

With this principle as a guide, I have carefully reviewed all of the evidence on agricultural value to determine on the entire record whether the Commissioners' findings are clearly erroneous and if so, what is the proper award to be made for each of the tracts involved.

Twin City offered two experienced land appraisers. One, W. N. Henderson of Ninety-Six, in Greenwood County, South Carolina, is a Clemson College graduate with 14 years of experience as a Federal Land Bank appraiser and 4 years with FHA. The other, Benjamin R. T. Todd, was educated at Clemson and at the Naval Academy. He had long years of experience as Senior Appraiser with the Federal Land Bank in Columbia. Each has appraised many tracts of land in the area of the Clark Hill reservoir. Both of these witnesses, as well as the witnesses for the United States, have testified before me in other condemnation cases.

Mr. Henderson, after detailed study of the several tracts being considered, determined that the principal agricultural uses of these lands were for pasturage to feed cattle, which at the time of taking was an important and growing use of lands in this area, and for the growing of pine. Some 300 acres of bottom land were also useful for row crops. All of the witnesses for both sides agreed that raising cattle and pine had become the chief use of lands in this area, though row crops were still planted in the bottoms.

Mr. Henderson concluded that, aside from the value of timber and pulp wood on these tracts, the 300 acres of bottom land was worth $100.00 per acre and the other 1300 acres had a value of $85.00 per acre. In reaching these conclusions, Mr. Henderson took into consideration the amount it would take to put land into pasturage condition, the yield from tree farming, the price of timber and pulp wood, the demand for such lands. He valued the timber on the properties at $17,000.00 and the strip of land used for a railroad (5.80 acres) at $1500.00. His total valuation for Twin City's South Carolina properties was $159,425.00.

Mr. Todd's valuation at $100.00 per acre aggregated $161,080.00.

The United States offered as its timber appraiser Clark Honnold, who made a detailed study of each tract and concluded that the total value of the standing timber and pulp wood aggregated $13,338.00. The Commissioners accepted this valuation in preference to the somewhat higher figure given by Mr. Henderson. Apparently the chief difference between the witnesses was due to price rather than to the amount of timber. I cannot say that the Honnold appraisal is clearly erroneous. Therefore the findings of timber value are confirmed.

The United States presented as its chief land witness Spencer Cooley, who was employed by it as a full time appraiser from 1946 until 1951. Never having previously appraised or sold land in this area, Mr. Cooley adopted a "comparable sales" method for his testimony here. From the Clerk's office in McCormick County, South Carolina, in which county the Twin City lands are located, he listed some 400 transfers of rural lands between 1945 and 1950, which he listed as "Comparable Sales." From this list of 400 he selected seven for use in comparison with the Twin City properties in South Carolina. Of these seven, five were of sales in 1948 or prior thereto, two in 1949 and none in 1950 or 1951. Yet the Twin City lands were condemned in December, 1949, and July, 1950. Mr. Cooley admits that it was almost impossible to buy land in McCormick in 1950 and concedes that to buy land in that County at the time of taking one would have to pay a much higher price than his appraisals. Again of the seven "comparable sales" Mr. Cooley includes five which were in the reservoir area and sales which were made after the development of Clark Hill was announced. These would not be market value sales because no farmer would buy knowing that the United States would flood the land within a year or two. For these reasons I find little of probative value in Mr. Cooley's testimony.

The Commissioners in their finding followed the appraisal of James M. Cox who testified for the Government. Mr. Cox is a furniture dealer, a cattle raiser and a sawmill operator. He had no experience in handling real estate for others and little for himself. Instead of testifying as to market value he appraised so as to allow for "making a sawmill man's profit on it." The testimony does not

show how much below market value this is. He was unwilling to state the land's worth for pasture though he stated that one of its best uses was for raising cattle. His is not the type of testimony on which an award should be based when there is in the record so much more reliable evidence.

Another Government witness, the Augusta broker Gould Barrett, had never inspected the Twin City lands, had not sold any lands in McCormick County in the five years before his testimony in his case, and was unfamiliar with timber prices. These witnesses for the United States placed a per acre value on the Twin City lands of between $15.00 and $25.00 per acre. The Commissioners, adopting the testimony of James M. Cox on land and Clark Honnold on timber, added a value of $5.00 per acre for assembling and arrived at a total value of about $30,000.00 as compared with the Henderson and Todd appraisals of about $160,000.00.

The findings of the Commissioners as to the agricultural value of these South Carolina lands based on the Cox appraisal are clearly erroneous as that term is defined hereinabove.

Twin City owned in fee a strip of land some two miles in length running from the C. & W. C. Ry. near Modoc to its dam site at Price's Island. A railroad was built on this 30' strip of land. Most of the strip, totalling 5.80 acres, was taken by the United States. The Commissioners awarded nothing, though concededly it was owned in fee. The testimony of Mr. Henderson is that it was worth $1500.00. While such a strip is difficult to appraise since no farmer would sell a strip through his property except at an exorbitant price, it has limited use for the owner. However, the Report is clearly erroneous in not fixing some value for this.

The Commissioners found that Twin City had assembled into one ownership this large block of land, and added $5.00 per acre for the increase in value attributable to this assembling. Neither side has objected to this holding and it is therefore adopted by the Court.

Twin City also urges for consideration on the issue of value the fact that in arriving at a total market value for

the Twin City lands in South Carolina and Georgia the Commissioner accepted the testimony of William Creager that the market value of the property was $1,600,000.00, but in fixing the total award deducted therefrom $343,000.00 as the amount which Twin City would have been required to pay for 745 acres of land over which it held "expired options" and which the witness Creager assumed Twin City had the right to flood. The Commissioners used a hold-up price of $460.00 per acre for this land, which was arrived at by using an actual agricultural value of $80.00 per acre and multiplying this by a hold-up factor of 5.7.

Twin City by its objection 9(b) asked the District Courts to raise the total award of $1,257,000.00 because the deduction of $343,000.00 was based on an agricultural value of $80.00 per acre and elsewhere the Commissioners had fixed an agricultural value of approximately $30.00 per acre. The United States successfully opposed this increase in valuation and the two District Courts affirmed the award of $1,257,000.00. (See Opinion, 114 F. Supp. 724). Since the 745 acres valued by this computation at an agricultural value of $80.00 by the Commissioners and the District Courts is immediately contiguous to and of the same character as the fee lands now before the Court, Twin City argues that my decree of August 26, 1953 is an adjudication that the agricultural value of this land is $80.00 per acre.

While this argument is plausible, I am not prepared to agree that this refusal to raise the award of the Commissioners constitutes an adjudication of the agricultural value. However, this points to a major inconsistency in the Commissioners' report. If the agricultural value is $80.00 per acre when a deduction from power value is under consideration, it is difficult to rationalize a value of $30.00 when agricultural value is the yard stick of just compensation. This inconsistency confirms my view that the Report is clearly erroneous in its determination of land values as distinguished from timber values. It therefore becomes my duty on consideration of the entire record to fix the just compensation for each of these tracts without giving any consideration to that part of their market value attributable to the proximity of these lands to the Savannah River.

These then are the contentions of the parties as modified by my confirmation of the Honnold timber appraisals and the added value for assembling the property:

CONTENTION OF THE UNITED STATES

(Based on the Commissioners' Report)

Civil Action No. 786. Declaration of Taking Filed June 23, 1947.

Tract No.	Acreage	Land Valuation	Timber Valuation	Total
C-215	5.80	$ None	$ None	$ No value
Assembling value at $5.00 per acre				29.00
Total value				$ 29.00

Civil Action No. 1033. Declaration of Taking Filed December 21, 1949.

Tract No.	Acreage	Land Valuation	Timber Valuation	Total
F-500	1,033.00	$24,744.80	$8,184.80	$32,929.60
H-700	497.00	12,799.00	4,847.00	17,646.00
				$50,575.60
Value of assembling at $5.00 per acre				7,650.00
Total value				$58,225.60

Civil Action No. 1073. Declaration of Taking Filed July 5, 1950.

Tract No.	Acreage	Land Valuation	Timber Valuation	Total
H-732	70.00	$ 1,257.00	$ 107.00	$ 1,364.00
F-541 (part)	5.00	100.00	200.00	300.00
				$ 1,664.00
Value of assembling at $5.00 per acre				375.00
Total value				$ 2,039.00

CONTENTION OF TWIN CITY

(Based on Henderson Testimony with Honnold Timber)

Civil Action No. 786.

Tract No.	Acreage		Henderson Land Appraisal With Honnold Timber Appraisal
C-215	5.80		$ 1,500.00

Civil Action No. 1033.

Tract No.	Acreage		
F-500	1,033	175 acres at 100	$ 17,500.00
		858 acres at 85	72,930.00
		Timber	8,184.00
		Value of assembling at $5.00 per acre	5,165.00
		Total	$103,779.00
H-700	497	100 acres at $100	10,000.00
		397 acres at 85	33,745.00
		Timber	4,847.00
		Value of assembling at $5.00 per acre	2,485.00
		Total	$ 51,077.00

Civil Action No. 1072.

Tract No.	Acreage		Henderson Land Appraisal With Honnold Timber Appraisal
H-732	70	25 acres at 100	$ 2,500.00
		45 acres at 85	3,825.00
		Timber	107.00
		Value of assembling at $5.00 per acre	350.00
		Total	$ 6,782.00
F-541	5	At 85	425.00
		Timber	200.00
		Value of assembling at $5.00 per acre	25.00
		Total	$ 650.00

The most careful appraisal of the land as distinguished from the growing timber was by the witness Henderson. His experience as an appraiser lends weight to his valuation. The Commissioners described him as a competent land evaluator. My observation of him as a witness in other condemnation cases leads me to the same conclusion. After a study of all of the evidence it is my view that his testimony is entitled to more weight than that of the witnesses for the United States. However, I have concluded

that in fixing just compensation the evidence of the Government witnesses should be given some weight and therefore in establishing the awards for the several tracts I have reduced the Henderson appraisals.

The just compensation to which the landowner is entitled for the several tracts is as follows:

C/A 786	Tract C-215	5.80 acres		$ 1,200.00
C/A 1033	Tract F-500	1,033 acres	$83,119.00	
	Tract H-700	497 "	41,137.00	$124,256.00
C/A 1073	Tract H-732	70 "	$ 5,382.00	
	Tract F-541	5 "	550.00	$ 5,932.00

It is therefore Ordered that judgments be entered in Civil Actions 786, 1033 and 1073 in accord with this order with interest from the respective dates of taking, subject to credit for such sums as have heretofore been paid into court.

C. C. WYCHE,
United States District Judge for the Western District of South Carolina.

November 1, 1956.